

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 18, 2009

CLARK DERRICK FRAZIER v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Robertson County
No. 06-0350 John H. Gasaway, III, Judge

No. M2008-01303-CCA-R3-PC - Filed May 5, 2009

Petitioner, Clark Derrick Frazier, appeals the post-conviction court's dismissal of his post-conviction petition in which Petitioner alleged that the entry of his plea of guilty was not voluntarily or knowingly entered because of the ineffective assistance of counsel. After a thorough review we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Clark Derrick Frazier.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Jason White, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Petitioner was indicted in count one of the indictment for first degree premeditated murder and in count two for first degree felony murder. The State withdrew count three of the indictment charging Petitioner with assault. On March 9, 2007, Petitioner entered a plea of guilty to the lesser included offense of second degree murder in count one of the indictment, and the State entered a nolle prosequi as to count two. Pursuant to the terms of the negotiated plea agreement, Petitioner was sentenced as a Range I, standard offender, to twenty-five years. The transcript of the guilty plea submission hearing does not contain a recitation of the State's factual basis in support of Petitioner's conviction. The trial court observed during the hearing that a sufficient factual basis had been developed during pre-trial hearings, but the transcript of these hearings are not included in the record.

The indictment, however, alleges that Petitioner repeatedly stabbed the victim, Rosario Salas Angel, during a robbery causing the victim's death.

At the guilty plea submission hearing, Petitioner stated that he understood the charges against him. The trial court explained the constitutional rights Petitioner was foregoing by entering his plea of guilty, and Petitioner stated that he understood. Petitioner indicated that he had reviewed and discussed the terms of his plea agreement with his trial counsel. Petitioner acknowledged that his plea of guilty was being made voluntarily, and no one had threatened or coerced him into entering his plea. Petitioner acknowledged that he was satisfied with his counsel's representation and that counsel had addressed all of his issues. Petitioner acknowledged at the hearing that he had inflicted the wounds that caused the victim's death. Petitioner stated that he understood that if he had been convicted after a trial, he would have been sentenced as a Range II, multiple offender. The trial court found that Petitioner was entering his plea of guilty to the offense of second degree murder voluntarily and knowingly and accepted Petitioner's plea.

II. Post-Conviction Hearing

Petitioner testified that his trial counsel explained some of the consequences of entering a plea of guilty, but not all. Petitioner stated that he did not understand that if he had been convicted after a trial, he would have been able to collaterally attack his conviction. Petitioner stated that he did not understand his right to appeal a jury conviction until after he was confined and had access to the penitentiary's library. Petitioner acknowledged that trial counsel "did her job" on the motion to suppress his confession. However, Petitioner submits that if he had not entered a plea of guilty, he would have been able to challenge the trial court's denial of his suppression motion on appeal. Petitioner said that his trial counsel's assistance was also deficient because she did not secure a dismissal of the indictment after he was granted a second preliminary hearing. Petitioner stated that trial counsel told him that if he entered a plea of guilty, "it would be easier" on his girlfriend, Erin Harris, who apparently had been with Petitioner on the day of the offense. Petitioner acknowledged that Ms. Harris was initially a co-defendant in the case, and Petitioner wanted "to make sure that she went home to a little baby, so that was part of [his] decision." Petitioner said that he told the trial court at the guilty plea submission hearing that he understood the consequences of his plea only because he was coerced into entering his plea.

On cross-examination, Petitioner acknowledged that the State filed a notice of intent to seek punishment of Petitioner as a Range II, multiple offender. Petitioner denied, however, that trial counsel explained the range of punishment for a multiple offender charged with second degree murder. Petitioner agreed, however, that if he had been convicted of second degree murder following a jury trial, he faced a sentence as a Range II offender of between twenty-five and forty years.

Petitioner acknowledged that he understood that his girlfriend would testify against him if he proceeded to trial and that he had reviewed her statement. Petitioner also acknowledged that his trial counsel met with him three times before entering his plea of guilty to explain the terms of the

plea agreement. Petitioner stated that his trial counsel told him that the State would not accept a plea agreement with a sentence of less than twenty-five years because of his prior juvenile adjudications.

Petitioner stated that his trial counsel was ineffective for failing to file a motion to recuse the trial judge who conducted his second preliminary hearing because Petitioner had threatened to kill the judge. Petitioner acknowledged that he discussed the issue of recusal with his trial counsel and that he “may have” agreed to have the judge preside over the preliminary hearing.

On redirect examination, Petitioner acknowledged that the judge stated on the record that he had discussed the issue of recusal with Petitioner’s trial counsel, and that trial counsel agreed to proceed. Petitioner stated, however, that the results of his preliminary hearing would have been different had another judge presided at the hearing because if someone threatened to kill a judge, “they probably hold a grudge against you or something and be out to get you.”

Petitioner stated that his trial counsel’s assistance was ineffective because they were not successful in challenging the search warrant for DNA samples. Petitioner said that the search warrant was based on what the investigating officers believed to be blood on a shirt found at the crime scene. A subsequent test revealed that the substance on the shirt was not blood. Petitioner acknowledged that his trial counsel unsuccessfully raised the issue at the suppression hearing.

Trial counsel testified that she was licensed to practice law in October 2005, and that she was assigned to assist Petitioner’s lead counsel. Trial counsel said that lead counsel, who had been practicing law approximately twenty-seven years, monitored all of her work on Petitioner’s case. Trial counsel said that the parties agreed to proceed with the post-conviction hearing even though lead counsel had a conflict with the hearing date.

Trial counsel stated that Petitioner made a statement to the investigating officer that he had taken the victim’s wallet during the robbery, so the main concern initially was the first degree felony murder charge. Trial counsel said that a subsequent investigation revealed that Petitioner was the one who inflicted the fatal injuries. Trial counsel stated that plea negotiations began in approximately May 2006 and continued until March 2007. Initially, Petitioner would not agree to enter a plea of guilty unless the bargained for sentence was fifteen years. Trial counsel stated that she explained to Petitioner that he had a sufficient number of prior convictions not only to qualify him as a Range II, multiple offender, for sentencing purposes, but also to enhance his sentence within the Range II range. Trial counsel said that the offense was also committed while Petitioner was on parole which would also serve to potentially enhance his sentence within the range. Trial counsel said that Petitioner ultimately agreed to a twenty-five-year sentence after the case progressed through the pre-trial motion stage.

Trial counsel stated that she moved for a new preliminary hearing because several portions of the audio tape were inaudible. Trial counsel said that Petitioner understood that the dismissal of the indictment was procedural only, and that it was likely that probable cause to bind the case over to the grand jury would again be established by the State. Trial counsel said that at Petitioner’s

second preliminary hearing, Stephanie Hanson, who had not been called as a witness at the first preliminary hearing, testified that Petitioner had been using prescription drugs and alcohol prior to the offense. Trial counsel discussed with Petitioner the possibility of seeking a new suppression hearing based on Ms. Hanson's testimony.

Trial counsel said that before the second preliminary hearing, the judge met with counsel for all parties in chambers to discuss the recusal issue after the judge learned that he was the target of Petitioner's threats. Trial counsel stated that she and lead counsel met with Petitioner to discuss the issue. Trial counsel told Petitioner that the ultimate outcome of the preliminary hearing would not be any different if another judge presided, and Petitioner told them, "let's just get it done whatever, that's fine."

Trial counsel said that after the preliminary hearing, Erin Harris, Petitioner's girlfriend, decided to testify as a witness for the State, and her testimony would be very detrimental to Petitioner. This revelation was followed by numerous visits to Petitioner at the jail, and the exchange of letters and telephone calls. Trial counsel stated that Petitioner continued to believe that he and Ms. Harris would eventually reunite, and Petitioner wrote Ms. Harris letters while he was confined in the county jail.

Trial counsel said that Petitioner ultimately understood that this was not a situation where the identity of the perpetrator of the offense was in question; rather, it was "a degree of murder case." In a letter dated February 18, 2007, Petitioner informed trial counsel that he wanted to accept the State's offer of settlement with a recommended sentence of twenty-five years. Petitioner wrote in his letter:

I listened to you talk Fri[day] and it finally sounded hopeless to me. My Mom and Dad also told me to go on and take the deal[,] at least I will get another chance at life.

...

Thank you all for all of you all's [sic] help on my case. I see with this deal that I will have my second chance like I wanted[,] it will just be later in my life. . . . See, I finally understand what you have been telling me.

Trial counsel said that at this point in time the terms of a potential plea agreement had not been reduced to writing. On February 22, 2007, trial counsel met with Petitioner for approximately one hour to discuss the plea agreement and the status of his case. On March 5, 2007, trial counsel requested a written offer of settlement from the State which was provided on March 7, 2007. Trial counsel and lead counsel met with Petitioner on that date and reviewed the proposed plea agreement with Petitioner. Petitioner initialed each paragraph and signed the plea agreement. Trial counsel reviewed the plea agreement again with Petitioner on March 9, 2007, before the guilty plea submission hearing.

On cross-examination, trial counsel said that at the suppression hearing, she argued that Petitioner's statement should be suppressed because he was intoxicated at the time he was interviewed by the police. Trial counsel said that Ms. Hanson's testimony would only have served to support Petitioner's claim of intoxication but would not have altered the legal issues involved.

On redirect examination, trial counsel stated that she was aware that Petitioner had mental health issues and had reviewed all of Petitioner's childhood records. Trial counsel said that Petitioner was evaluated prior to trial and found competent to stand trial. Trial counsel denied that she told Petitioner that his case was "hopeless."

III. Standard of Review

To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. T.C.A. § 40-30-210(f). However, the trial court's application of the law to the facts is reviewed de novo, without a presumption of correctness. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. Id.; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he or she must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he or she must show that counsel's ineffective performance actually adversely impacted his defense. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. Id. at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the Strickland test before he or she may prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his or her counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. Id. Failure to satisfy either prong will result in the denial of relief. Id. Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. In cases involving a guilty plea, the petitioner must show prejudice by demonstrating that, but for counsel's errors, he or she would not have pleaded guilty but would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 42, 59, 106 S. Ct. 366, 370 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

IV. Analysis

On appeal, Petitioner argues that his plea of guilty to second degree murder was not voluntarily or knowingly entered into because of the ineffective assistance of counsel. Petitioner contends that he felt coerced to do so by his trial counsel and that trial counsel failed to fully explain the consequences of entering a plea of guilty. Petitioner submits that the “picture painted for [him] was one of hopeless doom,” and Petitioner believed that his trial counsel “had quit on him.”

At the post-conviction hearing, trial counsel testified that she and lead counsel met with Petitioner numerous times, and exchanged correspondence and telephone calls. A negotiated plea agreement was discussed with Petitioner for a period of approximately ten months, and trial counsel denied that she told Petitioner that his situation was “hopeless.” During this period, trial counsel said that Petitioner eventually understood that if he proceeded to trial, he risked a life sentence if convicted of first degree felony murder, or a sentence of between twenty-five and forty years if convicted of second degree murder as a Range II, multiple offender. Petitioner informed trial counsel by letter that he decided to enter a plea of guilty to second degree murder in exchange for a recommended sentence of twenty-five years. Petitioner’s parents supported Petitioner’s decision, and Petitioner stated that he wanted to have his “second chance” at life. Trial counsel said that at Petitioner’s request, she asked the State for a written offer of settlement. Trial counsel met with Petitioner on February 22, 2007, March 5, 2007, and March 9, 2007, concerning the terms of the negotiated plea agreement before the guilty plea submission hearing on March 9, 2007. Petitioner told the trial court that he was voluntarily entering his plea of guilty, and his plea was not the product of coercion.

The post-conviction court credited trial counsel’s testimony. The post-conviction court found that Petitioner’s:

claims that his lawyers did not adequately communicate with him about the case and his range status and that his lawyers, specifically [trial counsel], coerced him into taking the plea are completely without merits. The testimony of [trial counsel] indicates that [she] and [lead counsel] adequately kept [Petitioner] up to date on his case and adequately explained all the issues to him. Further, prior to accepting the plea, the court asked [Petitioner] many questions about his plea and the rights he was giving up by accepting the plea. The court also specifically explained to [Petitioner] that if this matter went to trial he would qualify as a Range II offender and explained the difference between a Range I and Range II offenders. Nothing in the evidence indicates that [Petitioner] was coerced into accepting the agreement.

Based on our review of the record, we conclude that the evidence does not preponderate against the post-conviction court’s finding that Petitioner has failed to show that trial counsel provided ineffective assistance of counsel during the guilty plea submission process, or that trial counsel coerced him into entering a plea of guilty to second degree murder. Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE